

## **Senator Durbin on the Filibuster**

### **April 26, 2005**

DURBIN: Mr. President, I come to the floor with feelings of great disappointment. I had hoped that on reflection, Majority Leader Frist would change his mind about taking part in a rally yesterday in Kentucky with groups that claim anyone who opposes President Bush's judicial nominees is opposed to ``people of faith." The organizers of that rally, the Family Research Council, called their rally ``Justice Sunday." I agree with Bob Edgar, general secretary of the National Council of Churches. A better name would have been ``Just Us Sunday."

This Republican religious group is trying to redefine faith to fit its own narrow definition. What is their test? Does their definition of faith turn to the Bible? You know the biblical test, how do you treat the least of your brethren. No, the litmus test of faith for this group is as follows: Do you agree that a President--namely President Bush--ought to be able to ignore the Constitution, the rules of the Senate, and 200 years of Senate tradition to appoint people to the Federal bench for lifetime appointments even if those nominees hold extreme political views outside the mainstream of America?

That is their test of faith. If you say yes, then you are a person of faith. If you say no, they would brand you as anti-God and anti-family.

It is telling that the depths we have reached in this political debate that the majority leader of the Senate would add his name and his words to a rally which is so divisive, which tries to make a constitutional issue a religious issue.

I had hoped Senator Frist would decide not to take part in it. I hoped he would have used his leadership position to discourage those who are using this religious McCarthyism that seems to be gripping our political system now that the Republicans are in control of the House and the Senate. Unfortunately, he did not.

He sent a taped message which contained within it, I will concede, some conciliatory words warning those involved not to go too far, as Senator Lindsey Graham did yesterday on a television show which I shared. But unfortunately, I am sure those who were involved with the Family Research Council were heartened by the appearance of Senator Frist.

Now we are learning that placing your own candidates in lifetime Federal judgeships is not enough for this group.

They are also plotting to rid the bench of Federal judges they don't like. The Los Angeles Times ran a story last Friday about a private conference of evangelical leaders in Washington, attended by Senator Frist and House Majority

Leader Tom DeLay, whose name appears constantly in this national debate. They had an audiotape of the conference.

The story quotes two of the organizers of yesterday's rally in Kentucky, talking about working with congressional Republicans on plans to get rid of the Federal courts they don't like. This is a quote from Tony Perkins, one of the lead spokesmen yesterday for the Family Research Council. He said this at this Washington, DC, conference with Tom DeLay and Bill Frist:

"There's more than one way to skin a cat, and there's more than one way to take a black robe off the bench."

According to the Times article:

Mr. Perkins said he had attended a meeting with congressional leaders a week earlier where the strategy of stripping funding from certain courts was ``prominently" discussed. ``What they're thinking of is not only the fact of just making these courts go away and recreating them the next day, but also defunding them," Mr. Perkins said.

The story reports Mr. Dobson, a reverend also involved with this effort, as saying:

"Very few people know this, that the Congress can simply disenfranchise a court. They don't have to fire anybody or impeach them or go through that battle. All they have to say is the Ninth Circuit doesn't exist anymore, and it is gone."

Mr. Perkins said these plans to remake America's courts are ``on the radar screen, especially of conservatives here in Congress."

We have valued, since the creation of this great Nation, our independent and balanced judiciary. I am certain that members of the judiciary are angered at times with positions taken and things said by those in the executive and legislative branches. It works both ways. Yet we understand the nature of our checks and balances, the nature of three separate branches of government is unique to America and has given us the strength to survive in this democracy for over 200 years.

The strategy of Tom DeLay, Senator Frist, and groups like the Family Research Council challenge this premise of our constitutional democracy. I would like to address the questions raised about what might happen if the Republicans go forward with the so-called nuclear option. First, let me tell you that the phrase ``nuclear option" was not conceived by a group of Democrats in a back room. As I understand it, Senator Trent Lott, a leading Republican, called this approach a nuclear option, understanding, as he did, that it is an assault on some of the most fundamental principles of the Constitution and the Senate. It was, in fact, nuclear

war and the use of a nuclear weapon from a procedural point of view. It assaulted one of the most basic principles of America, the principle of checks and balances.

Look at the political landscape in America today. Republicans control the White House, the House, the Senate, and the Supreme Court. Not in 60 years has so much power been vested in one party. But from the point of view of many of their special interest groups, it is not enough; they want more.

They don't just want to govern in America; they want to rule. That means they need and want powers beyond those given to a political party under our Constitution.

Think about why we have a Senate. It was part of the Great Compromise. Thirteen colonies came together, deciding whether they could work together as one government, and the smaller colonies said we don't have a chance. If you count numbers, the more populous colonies will always win the debate.

So the Great Compromise said the House of Representatives will have more people, with more representatives in the more populous States, so they will have more votes. But the Senate is different. Every State gets two Senators. The rules of the Senate were written so, even within the Senate, when one Senator objected to a major change in law, the Senate rules respected that minority Senator. In fact, it wasn't until right after World War I that there was a way to even stop what was known as a filibuster. If you saw "Mr. Smith Goes to Washington," you saw Jimmy Stewart, that new idealistic Senator, take to the floor arguing for something he believed in until he ran out of breath and collapsed. Well, that is the filibuster. The way you can stop it is with a certain number of votes. Beginning in the 20th century, that number of votes is 60. It recognizes that this unique Chamber in America's Government will always recognize the rights of the minority.

We have built on that principle, and that is why the filibuster was created. Sadly, the Republican majority today wants to break the rules of the Senate and change the filibuster rule. They want to end the checks and balances that have been part of this institution since the Constitution was written. For what?

So President Bush can have every judicial nominee he proposes to Congress, without debate, without dissent, and it would not be subject to a filibuster.

I think the filibuster is one of the most basic tenets of our checks-and-balances system. It prevents a tyranny of the majority and encourages compromise and moderation. Think about it; if it takes 60 votes, you need to compromise. If it takes 60 votes, neither side has that, so you need bipartisanship. It works every single day on legislation and on nominees.

What about the President's track record when it comes to judges? Consider this: Since President Bush came to office, he sent 215 names of judicial nominees to the floor of the Senate; 205 have been approved. Only 10 have not been approved. More than 95 percent of the President's nominees have been approved by the Senate but, sadly, the point of view of the White House is that it is not enough. They want them all. They are willing to assault the Constitution and change the Senate rules. With an approval rate of 95 percent, this is not a crisis; it is a manufactured political crisis.

Republicans claim it is unconstitutional to filibuster. They are wrong. The Constitution makes it clear that the rules of the Senate are the decision of the Senate. Here is what article I, section 5 of the Constitution specifically states:

“Each House may determine the rules of its proceedings. ....”

That means the House and the Senate may determine the rules of its proceedings. From the beginning, the Senate has allowed filibusters. In 1789, the first Senate filibustered a bill about moving the capitol from New York City to Washington. But these Republicans, under President Bush and Vice President Cheney, want to change that time-honored rule. They claim the use of the filibuster to block judicial nominees has never happened, that it is unprecedented. That is what you hear from them. They are wrong.

Before George W. Bush became President, 11 judicial nominations needed 60 or more votes--cloture--to end a filibuster.

On two other judicial nominations--one in 1986 and one in 1994--cloture was filed in order to end filibusters, but it was later withdrawn. Of those 11 nominations on which cloture was needed to end a filibuster, 4 occurred during the Clinton administration.

Let me just point to one. March 8, 2000, the nomination of Richard Paez to be a judge of the Ninth Circuit. Fourteen Republican Senators voted on the Senate floor to filibuster Judge Paez's nomination. Look at the list of the 14 Senators, and do you know what name you will find? Senator Bill Frist. He is now the majority leader, and he claims this never happened in the history of the Senate. He, in fact, voted on the floor of the Senate for a filibuster against Richard Paez, a Clinton nominee to the Ninth Circuit. For the record, it was vote No. 37, 106th Congress, second session, March 8, 2000.

In addition to the 4 Clinton judicial nominees who were filibustered, 60 additional Clinton nominees never received a hearing. It was a pocket filibuster. What is unprecedented is what Republicans are threatening now, to fundamentally change the rules and traditions of the Senate and the constitutional principle of checks and balances. To argue that no judicial nominee will ever need more than 51 votes--7 times since 1949, the Senate has faced this

question: Can a simple majority change the cloture rule? Every single time, the answer has been no, whether it was Democrats in the majority or Republicans in the majority.

In 1953, Minority Leader Lyndon Johnson, the ``Master of the Senate," as he was dubbed, a man who knew something about finding and using power wherever he could legitimately find it, worked with Majority Leader Taft to protect the Senate from the nuclear option of his day, when a single Democratic Senator threatened to use it.

Time and again, there have been threats to change this filibuster, and it has never happened. There has been ample opportunity to do that.

One Senator who was involved in that was Senator Fritz Mondale of Minnesota. He led a 1975 effort to change the cloture rule. Twenty-seven years later, in September 2002, an older and wiser Fritz Mondale came back to the Senate to talk about his years as part of the Leader's Lecture Series.

He admitted he made a mistake to try to push through a nuclear option. I want to read part of what he said. This is what Fritz Mondale said on reflection:

“When I came to the Senate, I thought a simple majority should be enough to end debate. I had seen the cloture rule abused in the past, especially on civil rights. The old rules permitted virtually endless talk. In recent years, many Senators had developed a post-cloture strategy where, even after a successful cloture vote, they could still carry on forever, reading and amending the Journal, reading and amending the Chaplain's prayer--as we did for several days--filing hundreds of amendments with no end in sight.”

Listen to what Fritz Mondale said:

“It had to be changed, and it was, to what is now called the Byrd rule. But to end a filibuster still requires 60 votes, and I believe that is about right.”

“It is a balancing act. You need to be able to close off debate, but you also need to give an individual Senator the power to stop everything in the country and to rip open an issue in a way that no other institution in America can. It can't happen in the House. Their rules of debate are very different. It can't happen in news conferences. It can't happen on talk shows. That is entertainment, not debate. Only the Senate can stop the Nation in its tracks, and it is the only body in the world that allows it.”

To claim, as nuclear option supporters do, that the 1975 effort proves the constitutionality of their plan is simply wrong. It is a misrepresentation of the facts.

They argue we are simply talking about judicial nominees. Yet we know from a Congressional Research Service analysis of this issue that if they went forward with the nuclear option on judicial nominees, nominees who are being appointed to the bench for a lifetime, more could follow from that.

I still hope we can avoid this constitutional confrontation, this crisis. I hope the destruction that will be brought to the Senate can be avoided. I hope we can have a positive view toward the Senate's future.

But let me say this: If the Republican majority in the Senate exercises the nuclear option, breaks the rules of the Senate for the first time to change the rules, to eliminate the filibuster on judicial nominees, to attack the principle of checks and balances, the constitutional principle of our Government, then I think the response from the Democratic side can easily be described as this: If the Republicans are going to break the rules, the Democrats are going to play by the rules.

Let me tell you what I mean.

We believe we must defend the Senate and the Constitution. We will not allow one party to eliminate an essential part of checks and balances. The Senate operates according to customs. The minority party defers to the majority party regarding what bills come to the floor, and other questions. It is a system that requires trust and cooperation every day.

If Republicans choose to use the nuclear option, they are choosing to assault that trust and cooperation. We can no longer routinely give our unanimous consent to whatever procedural request the majority leader makes. Instead, we will use the existing rules and precedents to have the Senate focus on the real crises facing America's families and businesses. Instead of granting deference to the Republican majority to set the agenda on the Senate floor, Democrats will use the existing rules and the precedents of the Senate to focus on issues such as health care, energy, education, minimum wage, making certain we take care of our veterans and soldiers.

We have already placed a number of important bills on the Senate calendar, any of which can be brought up at once if the Republicans trigger the nuclear option. These bills address real priorities and challenges we face: funding our schools, bringing down the price of gasoline at the pump, finding a way to provide health insurance and health care for Americans, veterans benefits, and imposing fiscal discipline with Government spending.

Let me make it clear. We are not going to set out to close down the Senate or to close down the Government. Senator Reid, our Democratic leader, and all the Members of the Senate feel as I do, that shutting down the Government was the hapless tactic of the Gingrich revolution. It was a terrible idea. Rush Limbaugh

was the only American applauding it every day, but the American people knew better. They want our Government to continue. They want Government services that are essential not to be in danger. So we are prepared to use the Senate rules to make certain that the defense of our Nation and the defense of our Armed Forces will be paramount, that passing key appropriations bills will occur, the Government will go about its business.

But when it comes to the rest of the debate in the Senate, when it comes to the agenda of legislative issues, we believe we can and will use the rules, if the nuclear option is exercised, to make certain that this debate is broadened--broadened beyond the special interest debates of K Street, the lobbyists who sit around the corridors out here begging for their bills to be called.

We will expand this to include a debate over issues American families are begging us to consider, such as the cost of health insurance, help in putting children through college, finding a way for us to deal with the energy crisis in a responsible way that will conserve energy and bring about more fuel efficiency, in addition to environmentally responsible exploration for new energy sources.

Let's talk about gasoline for a minute. Americans are paying nearly 50 cents a gallon more for gas today than they were a year ago. Gas prices have surged an average of 19 cents per gallon in the last 3 weeks. What is the Republican solution? Many times it is more of the same. Keep increasing America's dependence on increasingly expensive oil from increasingly volatile parts of the world.

If Republicans are insisting on changing the rules of the Senate, Democrats will use the opportunity to press for an end to price gouging at the pumps today. We will also push for real long-term solutions, including conservation and new sources of alternative energy that will make America more secure in the future.

Think of it, 45 million Americans in our country, 1 in 7 have no health insurance. Tens of thousands more are under-insured. Rising health costs are eating up every penny of the profits at many companies. Did you read the report in the paper in the business section last week? General Motors lost \$1 billion in the last quarter. When they were asked why they were losing money if they were still selling cars, they said: With every car we sell is \$1,500 in health insurance costs and \$500 in pension costs. So before we can compete with the foreign manufacturers, we have to pay for the health insurance and the pension costs.

What we are saying is this ought to be part of a national debate. There has not been a single suggestion on the floor of the Senate from the Republican leadership that they are ready to even discuss health care, nor from the White House.

If we move beyond the nuclear option, we on the Democratic side feel this debate has to take place, and we will move pro-actively to put this on the calendar for debate during this session of the Senate.

In recent months, we found the new prescription drug benefit under Medicare will cost hundreds of billions of dollars more than first estimated. Now this week a new report warns the drug benefit will not provide adequate coverage for seniors with cancer and other chronic illnesses, and leave them with huge personal prescription drug bills. If the Republicans in the Senate use the nuclear option to try to change the rules of the Senate, Democrats will use whatever rules we can, whatever leverage we can find to fix the Medicare prescription drug bill.

Millions of young people across America are going to graduate from high school next month. Many are off applying to colleges, fingers crossed they will get into that great school. But there is a fear in every family--at least in most families--that some of the sons and daughters who are accepted at the best schools will not be able to go because the families cannot afford it. If the Republicans insist on using the nuclear option, the Democrats will push to bring to the floor Senate measures to make college more affordable for families across America.

We will look for ways to bring to the floor a bill to fund properly VA health facilities and end the deficits that are forcing Americans all across America to wait months to see a doctor.

We do not have to manufacture crises. There are real, urgent problems with which this Senate ought to be dealing. If the Republicans are interested in governing, they will join the Democrats in addressing these issues. If they are more concerned about political gains, they will object. Democrats will not break the rules and we will not stand by idly if others try to destroy the rules of the Senate for temporary political advantage. We will use the rules, we will live by the rules, we will follow the rules at every opportunity to protect the Constitution and do the people's business.

Senators can expect if the nuclear option is called and passes we will spend more time at our desks, more time in session, more time on the floor, more time in Washington. The old complaint about 1,000-page bills coming to the Senate never having been read, they will be read. The complaint that amendments come to the floor Senators have not had a chance to read, they will be read. The complaint about speaking to an empty Chamber with few Senators around, that may change. There will be Senators on the floor, part of a debate over amendments that are important to this country.

I sincerely hope the Republican majority will think twice. Senator McCain said, and I think rightly, you never know what the next election might bring. You might find yourself in a minority status, and it is important for us to understand that as



Senators have come and gone, almost 1,900 now in the history of the United States, as issues have come and gone, as Congresses have come and gone, the traditions and rules of the Senate have endured. The Constitution which guides this Chamber, which brings us to the floor today and every day, the Constitution we have all sworn to uphold and defend is worth fighting for.

When a White House with any President of either party tries to extend their power at the expense of the Constitution, historically the Senate has said no.

This time, unfortunately, this President is demanding more power than any President in the history of the United States when it comes to judicial nominees. This President is demanding powers that have never been exercised under this Constitution. Sadly, his party, the proud Republican Party, is not willing to say no. They should.

In the past, Franklin Roosevelt's Democratic Party said no to him when he overextended. Thomas Jefferson's party said no to him when he tried to extend his Presidential power. They understood that the Constitution is more important than the power of any President.

I yield the floor